In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 268

EDWARD G. PARTIN, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 35–36) is reported at 356 F. 2d 512. The Board's Decision and Order (Pet. App. 8–24, 32–34) are reported at 148 NLRB 819.

JURISDICTION

The opinion of the court of appeals was issued on February 10, 1966 (Pet. App. 35). A petition for rehearing was denied on March 21, 1966, and the decree was entered on March 29, 1966. The petition for a writ of certiorari was filed on June 20, 1966.

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The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, petitioner's requests to reopen the hearing and to adduce additional evidence before the Board were properly denied.

STATUTE INVOLVED

The relevant provision of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), in addition to those set forth in the petition (p. 6), is as follows:

> Section 10(e).
>
> * * * If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. * * *

STATEMENT

The Board found that petitioner Partin, Business Agent of Local 5 of the Teamsters, had violated Section 8(b)(2) and (1)(A) of the National Labor Relations Act[1] by causing Ryder Trucking Company

[1] Section 8(b)(2) makes it an unfair labor practice for a labor organization or its agents "to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uni-

to discharge employee Calvin C. Clary because he sought to instigate an investigation of petitioner's alleged mishandling of Union funds (Pet. App. 18–21, 32–33). The Board ordered Partin to cease and desist from the unfair labor practices found, to notify the Company that he has no objection to the reinstatement of Clary, and to reimburse Clary for any loss of pay resulting from the unlawful discharge (Pet. App. 22–24, 33–34). The petition challenges the action of the Board and the court of appeals in refusing to reopen the proceeding in order to permit Partin and his counsel, who were not present at the Board hearing, to adduce evidence. The facts respecting this issue are as follows:

The complaint, based on a charge filed by Clary, issued on August 16, 1963, and set the hearing for September 16, 1963. On motions by the parties, including Partin, the hearing was several times rescheduled and ultimately opened on March 17, 1964, in Baton Rouge, Louisiana, before a Board Trial Examiner (R. 11–42; B.A. 1).[2] Attorney William C. Bradley appeared as counsel of record for Partin, and requested a continuance on the grounds that he had been retained as counsel only one day before and

formly required as a condition of acquiring or retaining membership." Section 8(b)(1)(A) makes it an unfair labor practice for a labor organization or its agents "to restrain or coerce * * * employees" in the exercise of the right "to form, join, or assist labor organizations" or to refrain from such activities.

[2] References to the pleadings and other formal documents comprising the "Transcript of Record" in the court below are designated "R." References to the portions of the testimony printed as an appendix to the Board's brief are designated "B.A."

that Partin and all of the Union officials were in Chattanooga, Tennessee (Pet. App. 8–9, n. 1; B.A. 4–6). Bradley stated that "if Mr. Partin is here in a week or 10 days or not I will be prepared to go forward with the matter * * *" (B.A. 6). Over the objections of the General Counsel and counsel for Clary, the charging party, the Trial Examiner granted Bradley's motion (B.A. 5–7). The hearing was continued until Wednesday, March 25, at 10 a.m. (Pet. App. 8; B.A. 7).

On March 25, when the hearing was resumed, neither Attorney Bradley nor Partin appeared (Pet. App. 8, n. 1; B.A. 9–10). Evidence was taken and the hearing was closed at 1:40 p.m. (B.A. 51). On April 1, 1964, George Bokat, the Board's Chief Trial Examiner, wrote Bradley from Washington, D.C., requesting an explanation of his failure to appear for the hearing on March 25 (Pet. App. 8–9, n. 1, 27–28). Over 3 weeks later, on April 25, Bradley replied that on the morning of the reconvened hearing[3] "a message was left at my office stating that the hearing had been cancelled * * *" (Pet. App. 29–30). Without identifying the source of the message, Bradley wrote that because he had "no reason to doubt the veracity of this message" he did not appear at the hearing. Bradley's letter requested a further continuance in order to present evidence (Pet. App. 30).

The Chief Trial Examiner referred Bradley's letter to the Trial Examiner, whose decision was then in

[3] Bradley's letter erroneously refers to the date of the reconvened hearing as March 24 (Pet. App. 29).

the process of final preparation. The Trial Examiner ruled that Bradley's letter did not provide an adequate basis for reopening the hearing (Pet. App. 8–9, n. 1). The Board affirmed the Trial Examiner's ruling (Pet. App. 32–33).

Petitioner sought review of the Board's order in the court of appeals, and filed a motion requesting that the case be remanded to the Board so that he could adduce additional evidence. In addition to the reasons for reopening the hearing previously advanced before the Board, the motion showed, for the first time, that the erroneous information that the Board hearing had been postponed had been furnished to petitioner by Mr. Walter J. Sheridan, an employee of the Department of Justice. Copies of the motion, the affidavits and the Board's response are set forth in the Appendix, *infra,* pp. 9–26. The court of appeals held that the Board had properly denied petitioner's request to reopen the hearing, and that no sufficient basis was presented for granting the motion to adduce additional evidence. The court also noted that (Pet. App. 2), "[w]hen the docket was called in this Court, counsel for petitioner was not present. This Court delayed hearing the case for a reasonable time after court opened to allow additional time for petitioner's counsel to appear. He had not appeared when court recessed on this day. * * * [N]either the petitioner nor his counsel appear to regard seriously the matter of responding to dockets or scheduled hearings." The court went on to find that the Board's unfair labor practice findings were amply supported by the

evidence, and it enforced the Board's order (Pet. App. 2).

ARGUMENT

Both the reopening of a hearing and the granting of a motion to adduce additional evidence are discretionary matters;[4] we believe such discretion was reasonably exercised here. Petitioner's counsel delayed more than three weeks in responding to the Chief Trial Examiner's inquiry as to why he failed to appear at the March 25 hearing, and his eventual response neither indicated who had informed him that the hearing had been cancelled nor the nature of the evidence which he would introduce. The Trial Examiner was therefore fully warranted in declining to reopen the hearing. In the court of appeals, petitioner showed a reasonable basis for believing that the March 25 hearing had been cancelled, but he wholly failed to indicate the nature of the additional evidence sought to be adduced as "material" and, indeed, even failed to appear at the oral argument of the case. The court of appeals, we submit, likewise did not exceed the permissible limits of its discretion in declining to grant petitioner's motion to adduce additional evidence in these circumstances. See *National Labor Relations Board* v. *May Department Stores Co.*, 154 F. 2d 533, 540 (C.A. 8), certiorari denied, 329 U.S. 725.

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[4] See *National Labor Relations Board* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563, 569; *National Labor Relations Board* v. *Eastern Massachusetts Street Railway Co.*, 235 F. 2d 700, 710 (C.A. 1), certiorari denied, 352 U.S. 951.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

ROBERT A. GIANNASI,
Attorney,
National Labor Relations Board.

JULY 1966.

APPENDIX

In the United States Court of Appeals for the Fifth Circuit

No. 21,970

EDWARD G. PARTIN, BUSINESS AGENT, GENERAL TRUCKDRIVERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL NO. 5, ETC., ET AL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

MOTION FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE

JURISDICTIONAL STATEMENT

This case is before the Court on a motion for leave to adduce additional evidence in a hearing before the National Labor Relations Board. The Court has jurisdiction under 29 U.S.C.A. 160(e) (hereinafter referred to as "the act").

PRELIMINARY STATEMENT

This matter comes before the Court upon petition by Edward G. Partin, Business Agent, General Truckdrivers, Chauffeurs, Warehousemen & Helpers of America, Local No. 5, Etc., Et Al, to review and set aside an order of the National Labor Relations Board seeking to compel petitioner to:

1. Cease and desist from:

(a) Causing or attempting to cause Ryder Truck Lines, Inc., to discriminate against employees in violation of Section 8(a)(3) of the Act, or to discriminate against any employee with respect to whom membership in Local No. 5, has been denied or terminated

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on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

(b) In any like or related manner restraining or coercing employes of Ryder Truck Lines, Inc., in the exercise of rights guaranteed in Section 7 of the Act, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment in accordance with Section 8(A)(3) of the Act.

2. Take the following affirmative action:

(a) Notify Ryder Truck Lines, Inc., in writing that he has no objection to the reinstatement of Calvin C. Clary.

(b) Make whole Calvin C. Clary for any loss of pay which he may have suffered by payment to him of a sum of money equal to that which he would normally have earned from July 30, 1962, to the date of petitioner notice to the Ryder Truck Lines, Inc., as provided in the foregoing paragraph, less his net earnings during said period (*Crossett Lumber Company,* 8 NLRB, 240, said backpay to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company,* 90 NLRB 289, together with interest thereon at the rate of 6 per cent per annum. *Isis Plumbing & Heating Co.,* 138 NLRB 716.

(c) Post in his office in Baton Rouge, Louisiana, and at all other places where he customarily posts notices to members of Local No. 5, copies of the notice attached hereto marked Appendix A. Copies of said notice to be furnished by the Regional Director for the Fifteenth Region shall, after being duly signed by Respondent, be posted immediately upon receipt thereof and maintained by him for 60 consecutive

days thereafter in conspicuous places, including all places where he customarily post notices to members of Local No. 5. Reasonable steps shall be taken by petitioner to insure that said notices are not altered, defacted, or covered by any other material.

(d) Deliver to the Regional Director for the Fifteenth Region signed copies of said notice in sufficient number to be posted by Ryder Truck Lines, Inc., the Company being willing.

(e) Notify the Regional Director for the Fifteenth Region in writing within twenty (20) days from the date of the receipt of this Decision what steps petitioner has taken to comply therewith.

STATEMENT OF THE CASE

Calvin C. Clary alleges that petitioner herein, Edward G. Partin, Business Agent, General Truckdrivers, Chauffers, Warehousemen & Helpers of America, has engaged in unfair labor practice affecting commerce as set forth and defined in National Labor Relations Act as amended 29 U.S.C. 151, et seq. Prior to June 15, 1962, General Truckdrivers, Chauffeurs, Warehousemen & Helpers of America entered into a collective bargaining agreement with Ryder Truck Lines, Inc., which said agreement contained inter alia, a union security clause as follows:

> "Article 88, Section 1(b). All present employees who are the Local Union on the effective date of this subsection shall remain members of the Local Union in good standing as a condition of employment. All present employees who are not members of the Local Union and all employees who are hired hereafter shall become and remain members in good standing of the Local Union as a condition of employment on and after the 31st day following the beginning of their employment or on and after the 31st day of following the effective date of

this subsection, whichever is the later. This provision shall be made, and become effective as of such time as it may be made and become effective under the provisions of the National Labor Relations Act, but not retroactively."

Calvin C. Clary further alleges that petitioner herein, Edward G. Partin, has been and is still discriminating against him by denying his membership in the union and thereby forcing a loss of employment of the said Clary with Ryder Truck Lines, Inc.

On the date of the original hearing before the Trial Examiner held March 25, 1964, petitioner's counsel was advised by telephone that the hearing had been canceled and passed without date and would be rescheduled. (See Appendix "C" to printed record). In addition the said proceedings before the Trial Examiner, held March 25, 1964, convened in the State Capitol Building, Baton Rouge, Louisiana, and without prior notice to the parties or their counsel, adjourned the hearing to Room 327 in the main Post Office Building at 709 Florida Street, Baton Rouge, Louisiana. Upon neither the petitioner, Edward G. Partin, or his counsel appearing at this said hearing and without making any inquiry whatsoever to determine the cause of their absences, the Trial Examiner proceeded to hear testimony.

STATUTE INVOLVED

Title 29 U.S.C.A. Section 160(e) as follows:

"If either party shall apply to the Court for leave to adduce additional evidence and shall show to the satisfaction of the Court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, it's member, agent, or agency, the Court may order such additional evidence to be taken before the Board, it's member, agent, or agency,

and to be made a part of the record. The Board may modify it's findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file it's recommendations, if any, for the modification or setting aside of it's original order.

ARGUMENT

A motion for leave to adduce additional evidence is the proper remedy for petitioner who has been unjustifiably deprived of his fundamental right to present his evidence before the Trial Examiner. On the morning of the hearing before the Trial Examiner, a message was left at the office of the petitioner's counsel stating that the hearing had been cancelled and would be re-scheduled. Since counsel had no reason to doubt the veracity of the message, he did not appear. (See letter from Mr. Bradley to Mr. Bokat, Appendix C of the Decision).

Under 29 U.S.C.A. Section 160(e) it is indicated that the Court will order additional evidence to be taken when it is shown that such evidence is material and that there were reasonable grounds for failing to adduce such evidence in the hearing. In the instant case, it is clearly evident that petitioner, through no fault of his own, has not even been afforded an opportunity to present his case.

The application of this statute is shown in the case of *Mississippi Valley Structural Co.* v. *N.L.R.B.*, 145 F. 2d 664 (1944). In that case, petitioner was required to withdraw from the hearing because one of petitioner's counsel was out of state because of bad health. The hearing was held before the Trial Examiner and it found against petitioner. The Circuit

Court of Appeals, 8th Circuit, in holding for petitioner, stated:

> "We think that under the circumstances of this case, this Court is justified in treating the petition for review as including an application by petition for leave to adduce additional evidence. This Court has discretion to see that before a party's rights are finally foreclosed his case has been fairly heard. We are satisfied that petitioner can produce evidence which is relevant and material and which was not before the Board, and that there were reasonable grounds for the failure of petitioner to adduce it at the hearing before the Trial Examiner."

The Courts are given discretion to see that before a party's rights are finally foreclosed his case has been fairly heard. As properly indicated by *N.L.R.B.* v. *Indiana and Michigan Electric Co.*, 318 U.S. 9, "Findings cannot be said to have been fairly reached unless material evidence might impeach as well as that which will support its findings, is heard and weighed."

Although petitioner herein has been denied the opportunity to cross-examine the charging party's witnesses, petitioner is willing to forego this if he is given an opportunity to present his own witnesses and evidence.

Petitioner's reliance on the telephone message that the hearing was cancelled and would be re-scheduled later, should be interpreted as "reasonable grounds for failure to adduce evidence at the hearing". See *Southport Petroleum Co.* v. *N.L.R.B.*, 62 S. Ct. 452, (1942).

In *N.L.R.B.* v. *Ideal Laundry and Dry Cleaning Co.*, 330 F. 2d 712, (1964), a post-election investigation was conducted without Respondent having any notice of it, and it was upon this investigation that

the Board based its decision. The Circuit Court, in refusing to uphold the Board's order stated:

> "Due process demands that either party be permitted to produce additional proof deemed material to the vital issue of appropriateness, if it was not a part of the record in the representative proceedings and for some reason was unavailable for consideration by the Board in its decision."

Upon a Trial Examiner's refusal to hear testimony from two of plaintiff's witnesses the U.S. Supreme Court in *Consolidated Edison Company* v. *N.L.R.B.*, 59 S. Ct. 206 has stated that this refusal was an abuse of discretion and plaintiff should have moved for leave to adduce additional evidence, which could have been granted on a showing of reasonable grounds. This case also indicates that if petitioner had not been notified of the hearing, the proceeding would be void. In the instant case, petitioner has been as fully deprived of his basic right to present his case as if he had not received notice of the hearing. It should be emphasized again that petitioner had no reason whatsoever to question the message left at the office.

CONCLUSION

For the reasons stated, it is respectfully submitted that petitioner's Motion for Leave to Adduce Additional Evidence be granted.

Respectfully submitted,

William C. Bradley,
WILLIAM C. BRADLEY,
Attorney for Petitioner.

CERTIFICATE

I, William C. Bradley, Attorney for Petitioner, Edward G. Partin, do hereby certify that a copy of the above and foregoing has this date been served upon

David L. McComb, Esq., for the General Counsel, and Roy Maughan and J. H. Bankston, Esq., Baton Rouge, Louisiana, for the charging party by mail addressed to each respectively, postage prepaid.

Baker, Louisiana, this, the 14th day of December, 1965.

William C. Bradley,
WILLIAM C. BRADLEY.

In the United States Court of Appeals for the Fifth Circuit

Case No. 21,970

EDWARD G. PARTIN, BUSINESS AGENT, GENERAL TRUCK DRIVERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA LOCAL NO. 5, ETC., ET AL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE

STATE OF LOUISIANA,
Parish of East Baton Rouge

Before me, the undersigned authority, a Notary Public duly commissioned and qualified within and for the Parish of East Baton Rouge, State of Louisiana, and therein residing, personally came and appeared: Joyce Ford Denham, a resident of lawful age of the Parish of East Baton Rouge, State of Louisiana, who, after being by me first duly sworn did depose and say:

That prior, on, and after March 24, 1964, your affiant was employed by William C. Bradley, Attorney at Law, as a legal secretary and that the said William

C. Bradley maintained his law office at 3010 Ray Weiland Drive, Baker, Parish of East Baton Rouge, State of Louisiana, with office telephone number, 775-5525.

That on and prior to the aforesaid date the said William C. Bradley represented and was the attorney of record for Edward G. Partin in the above entitled and numbered cause which was then pending for hearing before the Trial Examiner of the National Labor Relations Board, said hearing being fixed for March 24, 1964, at 10:00 o'clock, a.m.

That on the aforesaid date of March 24, 1964, at approximately 9:10 o'clock a.m., and shortly before the said William C. Bradley arrived at his said law office, there was received at the said law office a telephone call from a gentleman who identified himself as Mr. Walter Sheridan.

Since Mr. Bradley had not then arrived at his said law office, your affiant then and there received the telephone message on the aforesaid time and date from the aforesaid Mr. Walter Sheridan, advising that the aforesaid hearing fixed that morning at 10:00 o'clock a.m., as aforesaid, had been cancelled and that the same would be re-assigned through further notice.

Mr. William C. Bradley arrived at his said law office at the aforesaid date at approximately 9:20 o'clock a.m., and your affiant informed Mr. Bradley of the telephone call having been received that morning from Mr. Walter Sheridan and it's contents regarding the cancellation of the aforesaid hearing. In reliance thereupon Mr. Bradley did not attend the said hearing, but remained at his office the balance of the aforesaid morning.

Joyce Ford Denham

JOYCE FORD DENHAM.

Sworn to and subscribed before me, Notary, on this, the 14th day of December, 1965.

William C. Bradley,

WILLIAM C. BRADLEY, *Notary Public.*

In the United States Court of Appeals for the Fifth Circuit

No. 21970

EDWARD G. PARTIN, BUSINESS AGENT, GENERAL TRUCK DRIVERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL NO. 5, ETC., ET AL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE

STATE OF LOUISIANA
Parish of East Baton Rouge

Before me, the undersigned authority, a Notary Public, duly commissioned and qualified within and for the Parish of East Baton Rouge, State of Louisiana, and therein residing, personally came and appeared: William C. Bradley, a resident of lawful age of the Parish of East Baton Rouge, State of Louisiana, who, after being by me first duly sworn, did depose and say:

That he is an attorney-at-law, duly licensed to practice law in the State of Louisiana, and was so engaged in said practice on or after March 24, 1964, and there and then maintained his law office at 3010 Ray Weiland Drive, Baker, Parish of East Baton Rouge, State of Louisiana, with office telephone number, 775–5525.

That on or prior to the aforesaid date, your affiant was the attorney-of-record for Edward G. Partin, in the above entitled and numbered cause, which was

then pending for hearing before the Trial Examiner of the National Labor Relations Board and the continued hearing of the complaint here in question had been fixed for the said date of March 24, 1964, at 10:00 o'clock, A.M.

That shortly prior to your said affiant's arrival at his said law office on March 24, 1964, there was received in your said affiant's said law office at the aforesaid location, a telephone call, being there and then received by your affiant's secretary and receptionist, Mrs. Joyce F. Denham. The said telephone call was received at approximately 9:10 o'clock A.M., on the said morning and your affiant had not then arrived at his said office. Upon arriving at his said office on the aforesaid date at approximately 9:20 o'clock a.m., your affiant was informed by his said secretary and receptionist of the said telephone call from a Mr. Walter Sheridan, who, your affiant knew to be an employee of the U.S. Department of Justice and who your affiant further knew to be there and then employed in connection with the trial proceedings in Chattanooga, Tennessee, in which James Hoffa was a defendant and where your said affiant's client, Edward G. Partin, the above styled petitioner, was a very material witness, advising that the hearing before the Trial Examiner of the complaint here in question fixed for 10:00 o'clock had been postponed and that the same would be re-assigned by further written notification to your affiant.

Your affiant had no reasonable reason to doubt the veracity of said telephone conversation advising that the said hearing had been postponed and likewise since your affiant's office is located at Baker, Louisiana, at a point approximately ten (10) miles distant from the site fixed for said hearing and further since there were no means by which your affiant could telephone the committee room in the State Capitol to

verify the fact that the hearing had been postponed, your affiant did not appear on behalf of his client, Edward G. Partin, to cross-examine the witnesses presented by the respondent or to otherwise participate in the said hearing. In addition, any inquiry by your affiant at the place fixed for the said hearing, that is Committee Room Number Three (3), State Capitol Building, would have been without avail by virtue of the fact that without prior notice and at approximately 10:00 o'clock a.m., the Trial Examiner removed the said hearing to the District Courtroom of the United States Post Office Building, Baton Rouge, Louisiana, which is approximately one (1) mile distant from the place of the original hearing.

No inquiry was made of your affiant or to your affiant's office on the said date by the Trial Examiner or opposing counsel to reasonably determine the reason for your affiant's absence at the removed hearing by the Trial Examiner.

It was not until on or about April 3, 1964, when your affiant received a letter dated April 1, 1964, from George Bokat, Chief Trial Examiner, advising that the hearing had in fact been held and asking your affiant for an explanation for his non-appearance at the hearing and regarding the non-appearance of his client, the said, Edward G. Partin.

Your affiant further shows that through no fault of his own or that of his client, Edward G. Partin, that the said Edward G. Partin was deprived of a reasonable opportunity to testify and that your affiant was deprived on the part of the said, Edward G. Partin to present evidence and to cross-examine the witnesses of the respondent at the original hearing held before the Trial Examiner, as aforesaid.

WILLIAM C. BRADLEY.

Sworn to and subscribed before me, Notary, on this, the 14th day of December, 1965.

ANDREW J. BRUMETT, JR.,
Notary Public.

AFFIDAVIT

Walter J. Sheridan, being first duly sworn, upon oath, states as follows:

1. That from January 23, 1961, to August 28, 1964, he was employed by the United States Department of Justice as a Special Consultant to the Attorney General.

2. That in his official capacity as an employee of the United States Department of Justice, he became acquainted with Edward Grady Partin, then and now Secretary-Treasurer and Business Agent of Local Union No. 5, International Brotherhood of Teamsters, Chauffeurs and Warehousemen of America, located at Baton Rouge, Lousiana.

3. That during the month of March 1964, Edward Grady Partin inquired of him whether a hearing scheduled to be held by a trial examiner of the National Labor Relations Board, which hearing involved certain unfair labor practice charges by one Calvin C. Clarey, against Partin, was to be held in Baton Rouge, Louisiana, on or about March 24, 1964.

4. That he telephoned the Chief Counsel of the National Labor Relations Board who informed him that the matter "had already been postponed." He interpreted this to mean a postponement of the hearing then scheduled for March 24, 1964. (Actually, the Chief Counsel meant—as he later learned—that previously there had been a postponement and thus a further postponement was unwarranted.)

5. That he informed Edward Grady Partin he had learned that the said hearing had been postponed.

6. That Edward Grady Partin then requested him to call Partin's attorney, William C. Bradley of Baker, Louisiana, and inform Bradley the said hearing had been postponed.

7. That he called the offices of William C. Bradley at Baker, Louisiana, on or about March 24, 1964, and asked to speak with Mr. Bradley. A secretary answered the telephone and stated that Mr. Bradley was not in his office at the time. He then told the secretary to inform Mr. Bradley that the said hearing had been postponed.

Walter J. Sheridan,
WALTER J. SHERIDAN.

Sworn and subscribed to this 20th day of October 1965.

HELEN A. WISHER,
Notary Public.

My Commission Expires October 31, 1968.

In the United States Court of Appeals for the Fifth Circuit

No. 21970

EDWARD G. PARTIN, BUSINESS AGENT, GENERAL TRUCKDRIVERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL NO. 5, ET AL., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

MEMORANDUM IN OPPOSITION TO PETITIONER'S MOTION FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE

Petitioner has moved the Court for leave to adduce additional evidence under Section 10(e) of the Act which provides, in relevant part, that a motion for leave to adduce additional evidence "shall show to the

satisfaction of the Court that such evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board * * *" Thus, petitioner bears the dual burden of showing: (1) that the evidence he seeks to adduce is material, and (2) that there were reasonable grounds for his failure to adduce such evidence before the Board. For the following reasons we submit that petitioner has made no such showing, and that petitioner's motion should therefore be denied:

1. As set forth more fully in the Board's brief (pp. 7–8) the complaint in the instant case issued against petitioner on August 16, 1963, and set the hearing for September 16, 1963. However, on motions by the parties, including petitioner, the hearing was several times rescheduled and ultimately opened on March 17, 1964, in Baton Rouge, Louisiana, before a Board trial examiner. Petitioner's counsel, William C. Bradley, appeared at the hearing and requested a continuance on the grounds that he had been retained as counsel only 1 day before and that petitioner and all of the Union officials were in Chattanooga, Tennessee. Bradley stated that "if Mr. Partin [petitioner] is here in a week or 10 days or not I will be prepared to go forward with the matter * * *" The Trial Examiner granted Bradley's motion and continued the hearing until Wednesday March 25, 1964, at 10 a.m.[1] On March 25, when the hearing was resumed, neither Attorney Bradley nor petitioner appeared. Evidence was taken and the hearing closed at 1:40 p.m. On April 1, 1964, George Bokat, the Board's Chief Trial Examiner, wrote Bradley from Washington, D.C., requesting an explanation of his

[1] Petitioner inadvertently states that the hearing was rescheduled for March 24.

failure to appear for the hearing. Over 3 weeks later, on April 25, Bradley replied that on the morning of the reconvened hearing "a message was left at my office stating that the hearing had been cancelled * * *" Without identifying the source of the message, Bradley wrote that because he had "no reason to doubt the veracity of this message" he did not appear at the hearing. Bradley's letter requested that the hearing be reopened, and that a further continuance be granted, for the purpose of presenting evidence. The letter set forth no specific evidence which petitioner wished to introduce. The Chief Trial Examiner submitted the letter to the Trial Examiner, who ruled that petitioner had not come forth with sufficient grounds for reopening the hearing. The Board affirmed that ruling. As set forth in the Board's brief (pp. 14–17) the Board acted well within its broad discretion in such matters, since petitioner's failure to appear at the hearing on March 25 was of his own volition or neglect; further, petitioner did not come forth with an adequate ground for reopening the hearing.

2. Petitioner now seeks to invoke the statutory procedure, in Section 10(e), for court direction of an opportunity to introduce additional evidence after entry of the Board's decision and order. However, petitioner has alleged no grounds for the grant of such extraordinary relief at this stage of the proceeding. For the gravamen of the contentions in petitioner's motion is identical to that urged by petitioner before the Board and in his brief to the Court, that is, that the Trial Examiner and the Board improperly refused to reopen the hearing before entry of the decision and order. Thus, petitioner raises but one circumstance which he has not heretofore raised before the Board and the Court. That circumstance consists of a contention that the party who called

Attorney Bradley's office on the morning of March 25, 1964, and left a message that the hearing had been cancelled, was a representative of the Department of Justice, Walter J. Sheridan, who assertedly had understood from a discussion with the General Counsel's office that the hearing had been postponed. However, assuming Sheridan was the caller, petitioner does not show, nor could he, that this caused or excused Attorney Bradley's inordinate delay in replying to the Chief Trial Examiner's inquiry as to why he had not appeared at the hearing. Moreover, petitioner now relies on a circumstance which was within his knowledge throughout these proceedings. Thus, in his motion and the affidavits attached thereto petitioner states that Attorney Bradley knew on the morning of March 25, 1964, that the message regarding the postponement had been left at his office by Sheridan of the Department of Justice. Assuming this, petitioner thus chose not to reveal the caller to the Trial Examiner or the Board and give them an opportunity to consider the significance, if any, of the caller's identity. Furthermore, petitioner engaged in flagrant and unexplained delay in submitting such information to this Court, not revealing the identity of the caller in its brief filed in March 1965 and filing the instant motion only after the Court had set the case down for argument (February 3, 1966). Finally, petitioner continues to give no indication of any specific material evidence he seeks to introduce if the Court remands the case to the Board. Petitioner, therefore, provides no basis for a determination that the interest of justice compels that additional evidence be heard; and petitioner avowedly does not seek to cross examine the witnesses who were called by the General Counsel and whose testimony established petitioner's violation of the Act.

In short, petitioner has filed a motion to adduce additional evidence on grounds already raised before the Board and presented to the Court in the review proceeding. Insofar as petitioner asserts newly-discovered evidence which would warrant the granting of such a motion, it consists solely of information in petitioner's possession throughout these proceedings. Petitioner does not explain the significance of such information; nor does he explain his dilatory presentation of it. In these circumstances, he may not invoke the information to reopen the proceedings and thereby delay their consideration by the Court. *Southern Furniture Mfg. Co.* v. *N.L.R.B.*, 194 F. 2d 59, 62–63 (C.A. 5); *N.L.R.B.* v. *Southern Bleachery & Print Works*, 257 F. 2d 235, 241 (C.A. 4); *N.L.R.B.* v. *Perry Lumber Co.*, 244 F. 2d 17, 18 (C.A. 4); *Metal Blast Inc.* v. *N.L.R.B.*, 324 F. 2d 602, 604 (C.A. 6); compare, *S. D. Warren Co.* v. *N.L.R.B.* (C.A. 1), No. 6452, decided November 8, 1965 (60 LRRM 2385, 2386); *Local 130, IUE, AFL–CIO* v. *McCulloch*, 345 F. 2d 90, 95 (C.A.D.C.).

For the reasons stated above we respectfully submit that this Court should deny petitioner's motion to adduce additional evidence.

Respectfully submitted,

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